UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

CAREY CLAYTON	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No: 3:13-cv-219-JRS**
	)	
AARON'S, INC., et al.	)	
	)	
Defendants	)	
	)	

DEFENDANT AARON'S INC.'S MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(6)

COMES NOW Defendant Aaron's, Inc. ("Aaron's"), through undersigned counsel, and files this Motion to Dismiss Plaintiff's Complaint, with prejudice, under Rule 12(b)(6) of the Federal Rules of Civil Procedure, for failure to state a claim upon which relief can be granted. Clayton's complaint alleges violations of the Telephone Consumer Protection Act, specifically 47 U.S.C. § 227(b)(1)(A)(iii) (the "TCPA"), as well as causes of action for invasion of privacy by intrusion upon seclusion and intentional and/or negligent infliction of emotional distress. As set forth more fully below, Plaintiff's allegations do not support any of these causes of actions and his Complaint should be dismissed, with prejudice.

BACKGROUND

Plaintiff brought this cause of action against Defendant Aaron's and its alleged agents (together, "Defendants") seeking actual and statutory damages for alleged violations of the TCPA, specifically 47 U.S.C. § 227(b)(1)(A)(iii). Plaintiff also has alleged causes of actions for invasion of privacy by intrusion upon seclusion and intentional and/or negligent infliction of emotional distress.

In his complaint, Plaintiff alleges that, prior to July 6, 2012, Aaron's or its agents violated the TCPA by using an automated dialer to send text messages to him for the purpose of collecting a debt from him after he allegedly fell behind in his payments on the debt. (Compl. ¶¶ 11-13, 27, 29, and 34). According to Clayton, these text messages were "numerous" and made without his "express written consent." (Compl. ¶¶ 13-14). Clayton further alleges that the text messages, which were sent as part of Aaron's attempts to collect on a debt, resulted in an invasion of his privacy expectation and caused him to suffer emotional distress in the form of "feeling stressed, frustrated, and angered, amongst other negative emotions." (Compl. ¶¶ 17, 25-27, 33).

The debt Clayton continuously refers to in his Complaint arose from a lease agreement ("Agreement") entered into between Clayton and Aaron's on August 8, 2011, for the lease of a Panasonic television, a copy of which is attached to this Motion to Dismiss. (Exh. A).[1] The Agreement, which was signed by Clayton, contains a provision titled "Release of Information to Aaron's," which states, in relevant part: "By providing my telephone number(s), including any cellular number(s), I consent to receiving calls (both live and automated) from Aaron's regarding my agreement(s)." (Exh. A at 1).

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[1] Plaintiff did not attach a copy of the Agreement to his Complaint. However, the Agreement is a document central to Plaintiff's claim because he is contending that the terms of the debt did not authorize Aaron's to make automated calls. Therefore, the terms of the Agreement are properly before the Court under Rule 12(b)(6).

ARGUMENT

I. STANDARD OF REVIEW

Under Fed.R. Civ. P. 12(b)(6), a defendant may move for dismissal when a complaint fails to state a claim upon which relief can be granted. "In assessing such a motion, a district court must 'assume the truth of all facts alleged in the complaint and the existence of any fact that can be proved, consistent with the complaint's allegations.'" *Monton v. America's Servicing Co.*, No. 2:11cv678, 2012 U.S. Dist. LEXIS 117259, at *7 (E.D.Va. Aug. 20, 2012), quoting *Eastern Shore Mkts, Inc. v. J.P. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000). Although facts must be viewed in plaintiff's favor, "legal conclusions, elements of a cause of action, and bare assertions devoid of further factual enhancement fail to constitute well-pled facts for *Rule 12(b)(6)* purposes." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009). Thus, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," for the purposes of surviving a motion to dismiss under Rule 12(b)(6). *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Where a plaintiff has not alleged "enough facts to state a claim to relief that is plausible on its face," a complaint must be dismissed. *Bell Atl. Corp. v. Twombly*, 530 U.S. 544, 570 (2007).

II. CONSIDERATION OF DOCUMENTS OUTSIDE THE PLEADINGS IS APPROPRIATE IN THIS MATTER

Generally, in deciding a motion to dismiss under Rule 12(b)(6), a court may not consider any documents outside of the pleadings without converting the motion to one for summary judgment under Rule 56. However, the Fourth Circuit has acknowledged a number of exceptions to this general rule and has determined that courts may consider "official public records, documents central to plaintiff's claim, and documents sufficiently referred to in the complaint so long as the authenticity of these documents is not disputed." *Witthohn v. Fed. Ins. Co.*, 164 Fed. App'x 395, 396-97 (4th Cir. 2006) (citing *Alt. Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001)).

Although not attached to the Complaint, the Agreement between Aaron's and Clayton with regard to the debt owed by Plaintiff is central to his claim. Throughout the Complaint, Clayton alleges that Aaron's or its agent contacted him as part of Aaron's attempts to collect on an alleged debt. In fact, Clayton mentions "collecting a consumer debt," "alleged debt," "alleged consumer debt," and/or "debt collection" in at least six (6) paragraphs of his thirty-five (35) paragraph Complaint. (Compl. ¶¶ 11, 12, 25, 27, 29, and 34). Plaintiff alleges that Aaron's used an automatic telephone system to text him *without his consent.* (Compl. ¶¶ 1, 12, 14, 15, 16, 19, 23, & 26). Whether or not Aaron's was entitled to use an automated dialer to attempt to collect a debt is governed by the Agreement and is, therefore, central to Clayton's claim. The gist of Clayton's claim is that Aaron's alleged use of an automated dialer was a breach of the terms of the debt relationship, which is memorialized by the Agreement. Plaintiff's claims necessarily rely on the terms of the Agreement. Accordingly, the terms of the debt Agreement is central to Clayton's claims. The Agreement is the document that governs the relationship between Clayton and Aaron's and therefore, is integral to Clayton's claims and appropriate for consideration at the motion to dismiss stage without converting this Motion into one for summary judgment.

III. PLAINTIFF'S TCPA CLAIM FAILS

Plaintiff's TCPA claim should be dismissed for failure to state a claim. As an initial matter, Plaintiff's conclusory allegations, with no supporting detail, fail to adequately allege the use of an automatic dialing system. Second, Plaintiff's TCPA claim fails because Aaron's alleged use of an automatic dialing system to contact him regarding his debt was expressly authorized by Plaintiff, in writing. (Ex. 1, Agreement.)

Plaintiff alleges that Aaron's and/or its agents violated the TCPA, specifically 47 U.S.C. § 227(b)(1)(A)(iii), by sending texts to Plaintiff regarding the collection of a consumer debt using an automatic dialing system without his express written consent.

The TCPA, § 227(b)(1)(A)(iii), provides, as follows:

> (b)(1) Prohibitions. It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States --
>
> (A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice –
>
> (iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.

Text messages have been deemed to be synonymous with "calls" for purposes of the TCPA by both the Federal Communications Commission (the "FCC") and the courts. As the FCC has explained, "calls," for the purposes of the TCPA, "encompasses both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls, provided the call is made to a telephone number assigned to such service." *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* Report and Order, 18 FCC Rcd. 14014, 14115 (July 3, 2003). *See also Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9^{th} Cir. 2009) ("a text message is a 'call' within the meaning of the TCPA"); *Pinkard v. Wal-Mart Stores, Inc.*, No. 3:12-cv-02902, 2012 U.S. Dist. LEXIS 160938, at * 8 (N.D. Ala. Nov. 9, 2012) ("This court agrees with other courts that have upheld the FCC's interpretation that a 'call' under the TCPA includes a text message.").

A. Plaintiff Has Not Sufficiently Alleged The Use of An Automatic Telephone Dialing System

To establish a claim under the TCPA, the Plaintiff must properly allege that the text messages at issue were made "using an automatic telephone dialing system or an artificial or prerecorded voice." 47 U.S.C. § 227(b)(1)(A). Here, Plaintiff's allegations that Aaron's contacted it using an automatic telephone dialing system ("ATDS") are purely conclusory, with no supporting details. For example, in his complaint, Plaintiff alleges that "[u]pon information and belief … Defendants placed harassing text messages to Plaintiff, through the use of an auto-dialer." (Compl. ¶ 12). Plaintiff also alleges that "[u]pon information and belief, Defendants began contacting Plaintiff and placing numerous automated text messages to Plaintiff." (Compl. ¶ 12). These bald allegations are not sufficient to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555 (2007).

Although courts have acknowledged that limited information is available to plaintiffs regarding the use of an automatic dialing system prior to discovery with regard to TCPA claims, they have required plaintiffs to plead more than a "naked assertion" that an ATDS was used. *Kramer v. Autobytel, Inc.*, 759 F. Supp. 2d 1165, 1171 (N.D. Cal. 2010).

In *Kramer*, the court determined that plaintiff pled the use of an automated system sufficiently where "Kramer described messages from SMS short code 77893, a code registered to B2Mobile. The messages were advertisements written in an impersonal manner. [And] Kramer had no other reason to be in contact with defendants." *Id*. Similarly, courts have found pleadings to support allegations that a defendant used an auto-dialing system sufficient where the plaintiff alleged the use of an SMS short code, where the text of the message was impersonal and sent to many other individuals, and where there was no other reason for the placement of the call. *Abbas* *v. Selling Source¸ LLC*, No. 09CV3413, 2009 U.S. Dist. LEXIS 116697, at *12-13 (N.D. Ill. Dec. 14, 2009). *See also*, *Hickey v. Voxernet LLC*, 887 F.Supp. 2d 1125, 1130 (W.D. Wa. 2012) ("Plaintiff's allegations regarding the generic content and automatic generation of the message is sufficient to infer the use of an ATDS.").

Here, Plaintiff has provided no facts in support of his allegation that Defendants used an autodialer to reach him. He has not provided any information regarding the content of the texts, the numbers of texts or the timing of the texts. Additionally, it is clear from Plaintiff's complaint that Aaron's was not unknown to him, but was calling him in reference to collection of a debt. Accordingly, Plaintiff has not sufficiently alleged that Defendants used an ATDS to send him texts, as required to support a claim under the TCPA and his TCPA claim should be dismissed. *See e.g.*, *Gragg v. Orange Cabb Co., Inc.*, No. C12-0576RSL, 2013 U.S. Dist. LEXIS 7474, at *7 (W.D. Wa. Jan. 17, 2013) (finding plaintiff's allegations regarding the use of an ATDS insufficient under *Twombly* where his allegations were "unsupported by any specific facts").

B. Plaintiff Provided Express Consent to Be Contacted By Aaron's

The FCC has stated that "autodialed … calls to wireless numbers provided by the called party in connection with an existing debt are made with the 'prior express consent' of the called party, … [and] such calls are permissible." *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA Int'l for Clarification and Decl. Ruling*, 23 FCC Rcd. 559, ¶9 (Jan. 4, 2008). Thus, because "[t]he TCPA allows a collector to make automated or prerecorded collection calls if the called party has given prior express consent," a claim must fail where the Plaintiff has given his consent to be contacted. *Jordan v. ER Solutions, Inc.*, No. 10-62409, 2012 U.S. Dist. Lexis 156156, at * 8 (S.D. Fla. Oct. 18, 2012).

In *Jordan*, the Plaintiff was contacted in connection with a debt she incurred shopping at

Seventh Avenue, Inc. and brought a TCPA violation action against the debt collector to which her account was assigned, ER Solutions. *Id*. at *3. As a "term and condition of her purchase" with Seventh Avenue, Jordan agreed that:

> [Seventh Avenue] and any other owner or servicer of this account may use any information you give us, including but not limited to e-mail addresses, cell phone numbers, and landline number…to contact you for purposes related to this account, including debt collection. In addition, you expressly consent to any such contact being made by the most efficient technology available, including but not limited to automated dialing equipment and prerecorded messages, even if you are charged for the contact.

Id. at *9. The court determined that the provision "demonstrates that Jordan gave prior express consent to be contact." [sic] *Id*. Therefore, the court held that Jordan's TCPA claim could not succeed because she had expressly consented to contact from Seventh Avenue and its agents. *Id*. *See also*, *Kenny v. Mercantile Adj. Bureau*, 10-cv-1010, 2013 U.S. Dist. LEXIS 62415, at *20 (W.D.N.Y. May 1, 2013) (holding that Plaintiff's TCPA claim failed where Plaintiff provided consent to be contacted); *Pinkard* 2012 U.S. Dist. LEXIS 160938, at *16 (N.D. Ala. Nov. 9, 2012) (granting defendant's motion to dismiss where plaintiff consented to receiving text messages by providing defendant with her cell phone number).

Like the Plaintiff in *Jordan*, Clayton gave his express written consent to calls from Aaron's or its agents when he signed the Agreement with Aaron's in August 2011. The Agreement provides that: "By providing my telephone number(s), including any cellular number(s), I consent to receiving calls (both live and automated) from Aaron's regarding my agreement(s)." Even absent such language, by providing his cellular number to Aaron's, Plaintiff is deemed to have given express written consent for automated calls. Accordingly, because

Clayton consented to calls, and specifically automated calls, by Aaron's, his TCPA claim must fail.

IV. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR INVASION OF PRIVACY BY INTRUSION UPON SECLUSION

Plaintiff brings an invasion of privacy claim in the mistaken belief that the TCPA and the Graham Leech Bliley Act create a right of action for invasion of privacy. (Compl. ¶¶ 22 and 24). Plaintiff's invasion of privacy claim fails because, as addressed above: Aaron's did not violate the TCPA; and more specifically, because the TCPA does not create a cause of action for invasion of privacy and there is not a common law cause of action in Virginia for invasion of privacy.

Plaintiff's invasion of privacy claim similarly is not statutorily supported by the alleged "privacy" rights contained in the TCPA and Graham Leech Bliley Act. In his complaint, Plaintiff cites § 227(2)(B)(ii)(I) [sic][2] of the TCPA, which states:

> In implementing the requirements of this subsection, the Commission [FCC] may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe such classes or categories of calls made for commercial purposes as the Commissioner determines will not adversely affect the privacy rights that this section is intended to protect.

47 U.S.C. § 227(2)(B)(ii)(I) [sic]. (Compl. ¶ 22). Regardless of whether the TCPA is intended to protect a consumer's right to privacy, it does not create a cause of action for a violation of an individual's privacy interest. The TCPA explicitly sets out the actions that may be brought under § 227(b)(2), which are limited to "(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation, (B) an action to recover for actual monetary loss from such violation, or to receive $500 in damages for each such violation,

[2] The section cited is 47 U.S.C. § 227(b)(2)(B)(ii)(I).

whichever is greater, or (C) both such actions." 47 U.S.C. § 227(b)(3), "Private right of action." Thus, § 227(b) of the TCPA does not provide for a right of action for invasion of privacy by intrusion upon seclusion.

Plaintiff also cites to the Gramm Leech Bliley Act to support his claim for invasion of privacy. As set forth in Plaintiff's complaint, the Gramm Leech Bliley Act states that "It is the policy of Congress that each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information." (Compl. ¶ 24, quoting 15 U.S.C. § 6801(a)). However, like the TCPA, the Gramm Leech Bliley Act, 15 U.S.C. § 6801(a)), does not create a cause of action for invasion of privacy. *See*, *Bandy v. Midland Funding, LLC*, No. 12-00491-KD-C, 2013 U.S. Dist. LEXIS 7983, at *29 (S.D. Ala. Jan. 18, 2013) (holding that 15 U.S.C. § 6801(a) does not "create a cause of action for invasion of privacy" and dismissing Plaintiff's claim, with prejudice). Plaintiff's attempt to derive a statutory basis for an invasion of privacy claim under the TCPA and the Graham Leech Bliley Act is without foundation.

Moreover, it is well-settled that "Virginia does not recognize a common law cause of action for invasion of privacy." *Henderson v. Labor Finders of Va.*, No. 3:12cv600, 2013 U.S. Dist. LEXIS 47753, ay *29 (E.D.Va. April 1, 2013), citing *Cohen v. Sheehy Ford of Springfield, Inc.*, 27 Va. Cir. 161 (Va. Cir. Ct. 1992); *Bellotte v. Edwards*, 388 Fed. App'x 334, 339 (4th Cir. 2010) ("Virginia courts have never recognized a common law tort of invasion of privacy."). To the extent that Virginia does, "recognize a limited statutory right for invasion of privacy" it is only in cases "where an individual's 'name, portrait, or picture is used without having first obtained the written consent of such person.'" *Henderson*, 2013 U.S. Dist. LEXIS 47753, at *29, quoting Va. Code § 8.01-40. As the Virginia Supreme Court "recognized, '[b]y codifying only the [misappropriation of name and likeness], the General Assembly has implicitly excluded the [other common law torts of invasion of privacy] as actionable torts in Virginia.'" *Henderson,* 2013 U.S. Dist. LEXIS 47753, at *29, quoting *WJLA-TV v. Levin*, 264 Va. 140, 564 S.E.2d 383, 394 n.5 (2002).

Here, Clayton alleges that Aaron's "interfered, physically or otherwise, with the solitude, seclusion and/or private concerns or affairs of Plaintiff" by allegedly sending text messages to Clayton in attempts to collect a debt. (Compl. ¶¶ 25-26). Clayton has not alleged that his "name, portrait, or picture" was used without his consent and therefore has not asserted a potential cause of action under Va. Code § 8.01-40. Thus, Plaintiff has failed to state a cause of action for invasion of privacy and his claim should be dismissed.

V. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR INTENTIONAL AND/OR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Plaintiff's claim for intentional and/or negligent infliction of emotional distress is based on his allegations that the Defendants violated the TCPA and fails if Plaintiff's TCPA claim fails. Additionally, Plaintiff has not alleged sufficient facts to support an intentional or negligent infliction of emotional distress claim.

To state a cause of action for intentional and or negligent infliction of emotional distress, a plaintiff must allege that: "the wrongdoer's conduct is intentional or reckless; the conduct is outrageous and intolerable; the wrongful conduct and emotional distress are causally connected; and, the distress is severe." *Russo v. White*, 241 Va. 23, 26, 400 S.E.2d 160, 162 (1991), citing *Womack v. Eldridge*, 215 Va. 338, 342, 210 S.E.2d 145, 148 (1974). A plaintiff must allege that "the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Russo*, 241 Va. 23, 27, 400 S.E.2d at 162.

To survive a 12(b)(6) motion to dismiss a claim for intentional infliction of emotional distress under Virginia law, a Plaintiff must have alleged more than generalized facts for each of the elements of his claim. As the Court explained in *Russo v. White*:

> [E]ven on demurrer, the court is not bound by such conclusory allegations when the issue involves, as here, a mixed question of law and fact. This is not a negligence case where, according to Rule 3:16(b), an allegation of 'negligence' is sufficient without specifying the particulars. In the present claim, 'a plaintiff must allege all facts necessary to establish' the cause of action.

Russo 241 Va. at 28, 400 S.E.2d at 163, quoting *Ely v. Whitlock*, 238 Va. 670, 677, 385 S.E.2d 893, 897 (1989). Accordingly, general allegations are insufficient to support a claim for intentional infliction of emotional distress.

Additionally, a claim for neglicent infliction of emotional distress requires pleading "with specificity" that the plaintiff "incurred a physical injury which was the natural result of fright or shock proximately caused by the defendants' alleged negligence." *Delk v. Columbia/HCA Healthcare Corp.*, 259 Va. 125, 138, 523 S.E.2d 826, 834 (2000).

In *Russo*, the Court held that allegations that a plaintiff is "nervous, could not sleep, experienced stress and 'its physical symptoms,' withdrew from activities and was unable to concentrate at work" were not enough to support an intentional infliction of emotional distress claim. *Russo*, 241 Va. at 28, 400 S.E.2d at 163. The court noted that the plaintiff had not alleged "that she had any objective physical injury caused by the stress, that she sought medical attention, that she was confined at home or in a hospital, or that she lost income." *Id*. Thus, the court determined "that the alleged effect on the plaintiff's sensitivities is not the type of extreme emotional distress that is so severe that no reasonable person could be expected to endure it." *Id*.

See also *Henderson*, 2013 U.S. Dist. LEXIS 47753, at * 31-32 ("conclusory allegations that there was injury to [Plaintiff's] health and peace of mind" are insufficient for an intentional infliction of emotional distress claim").

Clayton has alleged simply that Defendants sent him text messages in an attempt to collect on an alleged debt. He does not specify how many text messages he received, the timing of the text messages or the contents of the text messages he received. Thus, Plaintiff has not made any allegations that would support that Defendants actions were "atrocious, and utterly intolerable in a civilized society." Plaintiff alleges that he "suffered emotional distress resulting in his feeling stressed, frustrated, and angered, amongst other negative emotions." (Compl. ¶ 17). Like the plaintiff in *Russo*, Clayton hasn't alleged any physical injury, loss of income or the type of severe emotional distress that is required under Virginia law. Accordingly, Plaintiff's conclusory allegations are insufficient to support a claim for intentional or negligent infliction of emotional distress and his claim for infliction of emotional distress must be dismissed.

CONCLUSION

Accordingly, for the reasons set forth above, Aaron's Motion to Dismiss under Rule 12(b)(6) should be granted and Plaintiff's Complaint should be dismissed, with prejudice, because Plaintiff has failed to state a claim upon which relief can be granted.

May 9, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on this 9th day of May, 2013, the foregoing document was filed through the Court's CM/ECF system that automatically generates service on counsel who have appeared in this case.

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